

# Know Your Canadian Constitution

<https://thecanadaguide.com/government/the-constitution/>

## The Constitution of Canada

The constitution of Canada provides the rules that Canada's government must follow — both in terms of how the government operates politically, as well as what it can and cannot do to its citizens.

### What is the Canadian Constitution?

When we talk about the **Constitution of Canada**, we're not talking about a single document, but rather a bunch of different ones that collectively make up the highest levels of Canadian [law](#).

The most important of these is the [Constitution Act of 1867](#), also known as the **British North America Act**. It outlines Canada's system of government, including the structure of [Parliament](#), the way [elections](#) work, the role of the [monarchy](#), the powers of the executive branch, and the division of powers between the federal government and the provinces.

The second key piece is the [Constitution Act of 1982](#), which is dominated by a long section called the **Canadian Charter of Rights and Freedoms**, which outlines the **civil rights** of each Canadian citizen. The 1982 Act also describes the process for changing (**amending**) constitutional laws.

Then there is everything else, which is to say various other lesser-known pieces of legislation that regulate things deemed to be “constitutional” matters — that is, laws that affect the fundamental institutions of the Canadian government — such as laws that regulate the [Governor General](#), the **Supreme Court of Canada**, and the [provincial parliaments](#). **Treaties** with the [aboriginal peoples](#) of Canada also have the force of constitutional law.

### History of the Canadian Constitution

Modern Canada was founded in 1867 when four British colonies in North America decided to unite and form a single, self-governing **confederation** under the [British Crown](#). The British law that outlined the terms and structure of this union was known as the **British North America Act**, and it provided Canada with a workable political system for nearly 120 years.

Since the British North America Act was a British law, it could only be modified by the **British parliament** when British politicians felt like it. From time to time, the Canadian [prime minister](#) would ask the British government for changes and they'd usually be made, but as Canada aged and became a more independent, powerful, and self-confident nation this state of affairs became increasingly awkward and embarrassing.

In the early 1980s, the government of Prime Minister [Pierre Elliott Trudeau](#) (1919-2000) made it a priority to “bring home,” or **patriate**, the BNA Act, and turn it into a wholly Canadian law that could only be modified by the government of Canada. With the support of British Prime Minister **Margaret Thatcher** (1925-2013), this goal was achieved in 1982 with her government's passage of the [Canada Act](#), which stripped Britain of all remaining lawmaking powers over Canada. The subsequent sight of Trudeau and **Queen Elizabeth II** (b. 1926) signing the new, patriated BNA Act — now renamed the **Constitution Act** — on Canadian soil remains one of the most iconic images of modern Canadian

[history](#).

## **The British North America Act / Constitution Act, 1867**

Written in Victorian legalese, the [Constitution Act, 1867](#) — which is the post-1982 name for the British North America Act — is not an easy thing to read, nor does it say a lot of things you might expect. Though it's the document that spells out Canada's system of government, it doesn't mention how the [parliamentary system](#) works, how the [prime minister](#) is chosen, how the [bureaucracy](#) is organized or other seemingly important matters.

The reasons why are perhaps best explained in the Act's preamble:

**WHEREAS the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom; and whereas such a union would conduce to the welfare of the provinces and promote the interests of the British Empire...**

### **Preamble to the Constitution Act, 1867**

**Back in 1867 the authors of the Constitution Act did not really think of themselves as creating a new country, but rather outlining the terms of union between four existing British colonies. It's from this perspective that the bulk of the Constitution Act is written, which explains why the majority of the document focuses on clarifying the different powers of the federal and provincial governments, rather than the style of those governments themselves.**

**The preamble's other important phrase is “a constitution similar in principle to that of the United Kingdom.” The Constitution of the United Kingdom operates more on tradition and custom than clear, explicit rules, and this was also intended to be the case with Canada. Even today, most of the rules governing the Canadian parliamentary system still aren't written down, but are said to be set by constitutional conventions that have arisen from centuries of British (and, since 1867, Canadian) tradition. As is often the case when rules aren't written down, however, there's always a lot of debate in modern Canada over what is and isn't a “convention,” especially when an unexpected or unusual situation arises that doesn't seem to have much precedent. This is why it can be a good thing to be a professor of political science in Canada; you'll often be summoned by the media and politicians to help interpret a tricky situation when the Constitution itself isn't much help.**

### **Parts of the Constitution Act, 1867**

The Constitution Act is divided into 11 **parts** which are divided into 147 **sections**. There are also six “schedules” at the end that clarify in greater detail things mentioned earlier in the document.

- **Parts I and II** are essentially the preamble, that describe the context of Canada's 1867 union.
- **Part III** describes the powers of the **executive branch**, which the constitution somewhat confusingly assigns to the [Queen](#) and [Governor General](#), even though in practice these powers are exercised by the [prime minister](#) and cabinet.
- **Part IV** describes the powers of the [House of Commons](#) and [Senate](#).
- **Part V** is a dated chapter describing how the [provincial governments](#) of [Ontario](#), [Quebec](#), [New Brunswick](#) and [Nova Scotia](#) work (other **provincial constitutions** exist in the form of separate

acts of the British Parliament).

- **Part VI** describes the different powers of the federal government and the provincial governments.
- **Part VII** describes some information about the [judicial branch](#).
- **Part VIII** sets out some of the debt and payment deals that were worked out between the colonies as part of the terms of the 1867 union, as well as some general economic rules and regulations the governments of Canada must follow.
- **Part IX** is “miscellaneous,” which includes more specifics about Ontario and Quebec, oaths of office, the languages of parliament, foreign treaties, and the appointment of government officers.
- **Part X** mandated the government of Canada to build a railroad from Quebec to Nova Scotia, and was repealed after it was completed.
- **Part IX** sets out a formula for deciding how many senators the [Atlantic provinces](#) will get after Prince Edward Island and Newfoundland join Canada, which was widely expected to eventually happen at the time the constitution was written (and indeed did, in 1873 and 1949, respectively).
- [Full text of the Constitution Act, 1867](#)

## **The Canadian Charter of Rights and Freedoms**

Along with the patriation of the BNA Act, one of the crowning achievements of Prime Minister Pierre Trudeau was adding a [Charter of Rights and Freedoms](#) to the Canadian Constitution. This Charter outlines the inalienable, protected **human rights**, **liberties**, and **freedoms** enjoyed by all Canadian citizens and prevents any Canadian government, at any level, from passing a law that violates them.

The Charter is formally called **Part I of the Constitution Act, 1982**, which is the second half of Canada’s “main” constitution (after the Constitution Act, 1867, described above). The Charter is divided into 34 sections.

## **The five Charter freedoms (Section 2):**

### **Freedom of conscience and religion**

#### **Section 2 (a)**

The freedom to practice any religion and participate in its rituals, as well avoid activities that violate one's religious beliefs.

### **Freedom of thought, belief, opinion and expression**

#### **Section 2 (b)**

The freedom to speak or think ideas relating to any perspective on any topic.

### **Freedom of the press and other media of communication**

#### **Section 2 (b)**

The freedom to print, publish, and distribute ideas in newspapers, magazines, books, television shows,

the internet, and more.

## **Freedom of peaceful assembly**

### **Section 2 (c)**

The freedom for groups of people to assemble for the purposes of meetings, protests, and other public and private gatherings.

## **Freedom of association**

### **Section 2 (d)**

The freedom to belong to organized groups, or have associations with groups and peoples of your choice.

## **The six main Charter rights (Sections 3-23):**

### **Democratic Rights**

#### **Sections 3-5**

The right to vote and run for office.

### **Mobility Rights**

#### **Section 6**

The right to enter and leave Canada, and live and work anywhere in Canada.

### **Legal Rights**

#### **Sections 7-14**

Basic right to liberty, right to be informed of charges when arrested, to be tried quickly and fairly, and be protected from arbitrary or cruel punishment.

### **Equality Rights**

#### **Section 15**

The right to equal treatment regardless of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

## Official Language Rights

### Sections 16-22

The right to receive government services in either English or French.

## Language Education Rights

### Section 23

The right to have one's children educated in the language of their parents.

## How the Charter of Rights and Freedoms Works

Laws passed by the Canadian government (or any [provincial government](#)) are not allowed to violate the Charter of Rights and Freedoms. **Section 24** of the Constitution Act, 1982 gives Canada's [courts](#) the power to overturn laws that violate the Charter, and since 1982 it has become common for Canadians to sue governments over laws and policies that they claim violate their Charter rights.

Obviously, all laws limit rights and freedoms to some degree, but **Section 1** of the Act explicitly states that these limits must be “**demonstrably justified in a free and democratic society.**” It's thus up to the courts to figure out when a law stops being a “demonstrably justified” limit on a freedom and starts being a violation of that freedom. In recent decades, Canadian courts have declared all sorts of laws **unconstitutional**, including limitations on abortion, laws criminalizing prostitution, and long mandatory prison sentences for convicted criminals. Though technically any court can rule a Canadian law unconstitutional, in practice, legal cases involving so-called “**Charter challenges**” are usually appealed all the way to the **Supreme Court of Canada**, which makes the final decision.

It's worth noting that the violation of a Canadian's human rights by a **private** entity, such as a business with discriminatory hiring practices, would not be considered a Charter matter, since the Charter only regulates the government and government employees. The [Canadian Human Rights Act](#) regulates actions between private individuals, with violations adjudicated by the **Canadian Human Rights Commission**, not the Canadian court system.

- [Full text of the Charter of Rights and Freedoms](#)
- [Charter Cases, profiles of leading court cases involving the Charter of Rights and Freedoms](#)
- [Notwithstanding Clause FAQ, CBC](#)

## Notwithstanding Clause

In order to prevent the courts from overturning an extremely popular or important law, the Charter contains a special section known as the **Notwithstanding Clause** (Section 33) that allows the federal or provincial governments to pass laws that violate the Charter so long as they're temporary (the maximum is five years) and don't violate a small group of super-protected rights (democratic rights, mobility rights, and official language rights).

Though the Notwithstanding Clause was supposed to appease fears about the Charter, the idea of the government passing openly unconstitutional laws quickly became very controversial, and the Clause has never actually been used in any significant way. Many argue it should be abolished.

## Other Constitutional Laws

Many other laws passed by Britain or Canada since 1867 hold the status of **constitutional law**, though these tend to be largely unknown to anyone who isn't a constitutional scholar. The laws Britain passed every time a new [province](#) joined Canada, for instance, are considered constitutional laws, as are a few special laws regulating the office of the [Governor General](#), the [House of Commons](#), and the Supreme Court. The Constitution Act, 1982 gives special protections to **Indian treaties**, which means those have the force of constitutional law as well.

What separates a normal law from a constitutional law? Well, **Part V** of the Constitution Act, 1982 contains a list of subjects which can only be changed using the constitutional **amending formula**. If a law affects one of those things, it's part of the constitution.

- [Canadian Constitutional Documents, Solon Law Archive](#)

## Changing the Canadian Constitution

As mentioned, the pre-1982 system for changing the Canadian constitution was to ask the British Parliament to pass a constitutional amendment. After the constitution was **patriated** — made an entirely Canadian law — a complicated new system for changing the constitution was introduced, known as the **amending formula**. Under this system, (described in [Part V](#) of the Constitution Act, 1982) there are different rules for passing different kinds of **amendments**.

An amendment that only “applies to one or more, but not all, provinces” requires approval from the Canadian parliament and the governments of any affected provinces. An amendment that affects *all* provinces, by contrast, requires the approval of at least **seven of the provincial governments representing at least 50 per cent of the Canadian population** (sometimes called the **7-50 formula**). On a handful of really important matters, such as changing the amending formula itself, *unanimous* provincial consent is necessary.

The very high bar for passing substantial amendments is probably the main reason Canada's Constitution has not been significantly modified since 1982, though there have been a few minor amendments passed, usually only involving one province (see sidebar). These are known as **Constitution Amendment Proclamations**.

- [The Constitution Since Patriation: Chronology, Parliament of Canada](#)

## Post-1982 Amendments

- 1983- Clarifying that future Indian treaties hold the status of constitutional law.
- 1985- Changing the formula for calculating the distribution of seats in the House of Commons.
- 1993- Granting New Brunswick's French minority the "right to distinct educational institutions" and "distinct cultural institutions."
- 1993- Approving construction of a bridge linking Prince Edward Island to the mainland.
- 1998- Ending Newfoundland's denominational public school system.
- 1999- Creation of the new territory of Nunavut.
- 2001- Officially adding "and Labrador" to the end of Newfoundland's name.

## The Troubles of the 1980s and 90s

Though the patriation of 1982 was a proud moment for Canada, and the Charter an important development for Canadian human rights, the overall structure of the Canadian government has long

been controversial, which has made the topic of **constitutional reform** a popular topic of political debate in Canada. Common criticisms include:

- Canada's [Senate](#) is undemocratic and unrepresentative, and should be changed,
- [Quebec's](#) status as a fundamentally “unique” part of Canada needs to be acknowledged, and Quebec needs to be given special powers to protect its culture and language,
- The secretive process of appointing [judges](#) to the Supreme Court of Canada needs to be changed,
- Seats in the [House of Commons](#) need to be more fairly distributed,
- Depending on your perspective, either the federal government or the provincial governments need more powers.

When [Brian Mulroney](#) (b. 1939) was elected prime minister of Canada in 1984, he twice tried to substantially change the Constitution to address some of these concerns, and twice failed.

The first effort came in 1987 with the **Meech Lake Accord**. Among other things, this package of constitutional amendments would have given Quebec the legal status of a “**distinct society**” within Canada, given provincial governments the ability to veto future constitutional amendments, and mandated provincial involvement in the process of appointing Supreme Court justices. This package was rejected after it failed to get unanimous consent of all provinces, but never one to be discouraged easily, in 1992 Mulroney proposed another even more ambitious package of amendments, known as the **Charlottetown Accord**. It promised many of the same things as Meech, but with many ambitious new ideas as well. On October 26, 1992 Charlottetown was put to a nation-wide **referendum** and was voted down, 54 to 46 per cent. The Accord was so complicated that almost everyone could find something wrong with it, and its rejection was a stinging rebuke to Mulroney, who resigned shortly after.

- [Text of the Meech Lake Accord, Solon Law Archive](#)
- [Text of the Charlottetown Accord, Solon Law Archive](#)

In the aftermath of Mulroney's resignation, “fixing the Constitution” quickly fell out of fashion as something Canadian politicians were willing to talk about, let alone attempt. Today, it continues to be seen as a very divisive topic with high potential to exacerbate Canada's regional cleavages, particularly between Quebec and the rest of Canada.

[https://en.wikipedia.org/wiki/Canadian\\_Charter\\_of\\_Rights\\_and\\_Freedoms](https://en.wikipedia.org/wiki/Canadian_Charter_of_Rights_and_Freedoms)

**The Canadian Charter of Rights and Freedoms** (**French**: *La Charte canadienne des droits et libertés*), often simply referred to as the *Charter* in Canada, is a **bill of rights** entrenched in the **Constitution of Canada**, forming the first part of the [Constitution Act, 1982](#). The *Charter*



guarantees certain **political** rights to Canadian citizens and **civil rights** of everyone in **Canada** from the policies and actions of all areas and levels of the **government**. It is designed to unify **Canadians** around a set of principles that embody those rights. The *Charter* was signed into law by **Queen Elizabeth II of Canada** on April 17, 1982, along with the rest of the *Constitution Act, 1982*.

The *Charter* was preceded by the *Canadian Bill of Rights*, enacted in 1960, which was only a federal **statute** rather than a constitutional document. As a federal statute, the *Bill* could be amended through the ordinary legislative process and had no application to provincial laws. The **Supreme Court of Canada** also narrowly interpreted the *Bill of Rights*, showing reluctance to declare laws inoperative.<sup>[a]</sup> The relative ineffectiveness of the Canadian *Bill of Rights* motivated many to improve rights protections in Canada. The movement for **human rights** and freedoms that emerged after **World War II** also wanted to entrench the principles enunciated in the **Universal Declaration of Human Rights**.<sup>[1]</sup> The British Parliament formally enacted the *Charter* as a part of the *Canada Act 1982* at the request of the **Parliament of Canada** in 1982, the result of the efforts of the government of **Prime Minister Pierre Trudeau**.

The *Charter* greatly expanded the scope of **judicial review**, because the *Charter* is more explicit with respect to the guarantee of rights and the role of judges in enforcing them than was the *Bill of Rights*. The **courts**, when confronted with violations of *Charter* rights, have struck down unconstitutional federal and provincial statutes and regulations or parts of statutes and regulations, as they did when **Canadian case law** was primarily concerned with resolving issues of **federalism**. The *Charter*, however, granted new powers to the courts to enforce remedies that are more creative and to exclude more evidence in trials. These powers are greater than what was typical under the **common law** and under a system of government that, influenced by Canada's parent country the **United Kingdom**, was based upon **Parliamentary supremacy**. As a result, the *Charter* has attracted both broad support from a majority of the Canadian electorate and criticisms by opponents of increased **judicial power**. The *Charter* only applies to government laws and actions (including the laws and actions of federal, provincial, and municipal governments and public school boards), and sometimes to the common law, not to private activity.

**Under the *Charter*, people physically present in Canada have numerous civil and political rights. Most of the rights can be exercised by any legal person (the *Charter* does not define the corporation as a "legal person"),<sup>[1]</sup>: 741–2 but a few of the rights belong exclusively to natural persons, or (as in sections 3 and 6) only to **citizens of Canada**. The rights are enforceable by the courts through **section 24** of the *Charter*, which allows courts discretion to award remedies to those whose rights have been denied. This section also allows courts to exclude evidence in trials if the evidence was acquired in a way that conflicts with the *Charter* and might damage the reputation of the justice system. **Section 32** confirms that the *Charter* is binding on the federal government, the territories under its authority, and the provincial governments.**

## Exceptions

**Section 1** of the *Charter*, known as the *limitations clause*, allows governments to justify certain infringements of *Charter* rights. If a court finds that a *Charter* right has been infringed, it conducts an analysis under section 1 by applying the **Oakes test**, a form of **proportionality** review. Infringements are upheld if the government's objective in infringing the right is "pressing and substantial" in a "free and democratic society", and if the infringement can be "demonstrably justified".<sup>[2]</sup> The Supreme Court of Canada has applied the *Oakes* test to uphold laws against **hate speech** (e.g., in *R v Keegstra*) and



obscenity (e.g., in *R v Butler*). Section 1 also confirms that the rights listed in the *Charter* are guaranteed.

In addition, some *Charter* rights are subject to the *notwithstanding clause* ([section 33](#)). The notwithstanding clause authorizes governments to temporarily override the rights and freedoms in sections 2 and 7 through 15 for up to five years, subject to renewal. The Canadian federal government has never invoked it, and some have speculated that its use would be politically costly.[\[3\]](#) In the past, the notwithstanding clause was invoked routinely by the province of [Quebec](#) (which did not support the enactment of the *Charter* but is subject to it nonetheless). The provinces of [Saskatchewan](#) and [Alberta](#) have also invoked the notwithstanding clause, to end a [strike](#) and to protect an exclusively [heterosexual definition](#) of marriage,[\[4\]](#)[\[b\]](#) respectively. The territory of [Yukon](#) also passed legislation once that invoked the notwithstanding clause, but the legislation was never proclaimed in force.[\[6\]](#)

## **Rights and Freedoms**

The rights and freedoms enshrined in 34 sections of the *Charter* include:

### **Fundamental freedoms**

#### [Section 2](#)

lists what the *Charter* calls "fundamental freedoms" namely [freedom of conscience](#), [freedom of religion](#), [freedom of thought](#), [freedom of belief](#), [freedom of expression](#), [freedom of the press](#) and of other media of communication, [freedom of peaceful assembly](#), and [freedom of association](#). In case law, this clause is cited as the reason for the [religious neutrality of the state](#).

### **Democratic rights**

Generally, the right to participate in political activities and the right to a [democratic](#) form of government are protected:

#### [Section 3](#)

the right to [vote](#) and to be eligible to serve as member of the [House of Commons of Canada](#) and [provincial and territorial legislative assemblies](#).

#### [Section 4](#)

the maximum duration of the House of Commons and legislative assemblies is set at five years.

#### [Section 5](#)

an annual sitting of Parliament and legislatures is required.

### **Mobility rights**

#### [Section 6](#)

protects the mobility rights of Canadian citizens which include the right to enter, remain in, and leave Canada. Citizens and Permanent Residents have the ability to move to and take up residence in any province to pursue gaining livelihood.

### **Legal rights**

Rights of people in dealing with the justice system and law enforcement are protected:

#### [Section 7](#)

right to life, liberty, and security of the person.

Section 8

freedom from unreasonable search and seizure.

Section 9

freedom from arbitrary detention or imprisonment.

Section 10

right to legal counsel and the guarantee of habeas corpus.

Section 11

rights in criminal and penal matters such as the right to be presumed innocent until proven guilty.

Section 12

right not to be subject to cruel and unusual punishment.

Section 13

rights against self-incrimination.

Section 14

right to an interpreter in a court proceeding.

## **Equality rights**

Section 15

equal treatment before and under the law, and equal protection and benefit of the law without discrimination.

## **Language rights**

Generally, people have the right to use either the English or French language in communications with Canada's federal government and certain provincial governments. Specifically, the language laws in the *Charter* include:

Section 16

English and French are the official languages of Canada and New Brunswick.

Section 16.1

the English and French-speaking communities of New Brunswick have equal rights to educational and cultural institutions.

Section 17

the right to use either official language in Parliament or the New Brunswick legislature.

Section 18

the statutes and proceedings of Parliament and the New Brunswick legislature are to be printed in both official languages.

Section 19

both official languages may be used in federal and New Brunswick courts.

Section 20

the right to communicate with and be served by the federal and New Brunswick governments in either official language.

Section 21

other constitutional language rights outside the *Charter* regarding English and French are sustained.

Section 22

existing rights to use languages besides English and French are not affected by the fact that only English and French have language rights in the *Charter*. (Hence, if there are any rights to use

[Aboriginal](#) languages anywhere they would continue to exist, though they would have no direct protection under the *Charter*.)

## Minority language education rights

### [Section 23](#)

rights for certain citizens belonging to French and English speaking minority communities to have their children educated in their own language.

## Other sections

Various provisions help to clarify how the *Charter* works in practice, including:

### [Section 25](#)

states that the *Charter* does not derogate existing Aboriginal rights and freedoms. Aboriginal rights, including treaty rights, receive more direct constitutional protection under [section 35](#) of the *Constitution Act, 1982*.

### [Section 26](#)

clarifies that other rights and freedoms in Canada are not invalidated by the *Charter*.

### [Section 27](#)

requires the *Charter* to be interpreted in a [multicultural](#) context.

### [Section 28](#)

states all *Charter* rights are guaranteed equally to men and women.

### [Section 29](#)

confirms the rights of [separate schools](#) are preserved.

### [Section 30](#)

clarifies the applicability of the *Charter* in the territories.

### [Section 31](#)

confirms that the *Charter* does not extend the powers of legislatures.

### [Section 34](#)

states that Part I of the *Constitution Act, 1982*, containing the first 34 sections of the Act, may be collectively referred to as the "Canadian Charter of Rights and Freedoms".

## History

Many of the rights and freedoms that are protected under the *Charter*, including the rights to [freedom of speech](#), [habeas corpus](#), and the [presumption of innocence](#),<sup>[7]</sup> have their roots in a set of Canadian laws and legal precedents<sup>[8]</sup> sometimes known as the [Implied Bill of Rights](#). Many of these rights were also included in the [Canadian Bill of Rights](#) (CBR), which the [Canadian Parliament](#) enacted in 1960. However, the CBR had a number of shortcomings. Unlike the *Charter*, it was an ordinary [Act of Parliament](#), applicable only to the federal government, and could be amended by a simple majority of Parliament. Moreover, the courts chose to interpret the CBR only sparingly, and only on rare occasions applied it to find a contrary law inoperative. Additionally, CBR did not contain all of the rights that are now included in the *Charter*, omitting, for instance, the [right to vote](#)<sup>[9]</sup> and [freedom of movement](#) within Canada.<sup>[10]</sup>

The centennial of [Canadian Confederation](#) in 1967 aroused greater interest within the government in constitutional reform. Such reforms would not only improve the safeguarding of rights, but would also

amend the Constitution to free Canada from the authority of [British Parliament](#) (also known as [patriation](#)), ensuring the full [sovereignty of Canada](#). Subsequently, [Attorney General Pierre Trudeau](#) appointed law professor [Barry Strayer](#) to research a potential bill of rights. While writing his report, Strayer consulted with a number of notable legal scholars, including [Walter Tarnopolsky](#). Strayer's report advocated a number of ideas that would later be evident in the *Charter*, including the protection of language rights; exclusion of economic rights; and the allowance of limitations on rights, which would be included in the *Charter's* limitation and notwithstanding clauses.<sup>[11]</sup> In 1968, Strayer was made the director of the Constitutional Law Division of the [Privy Council Office](#), followed in 1974 by his appointment as assistant deputy [Minister of Justice](#). During these years, Strayer played a role in writing the bill that was ultimately adopted.

## ***Constitution Act, 1982***

Meanwhile, Trudeau, who had become [Liberal](#) leader and prime minister in 1968, still very much wanted a constitutional bill of rights. The federal and provincial governments discussed creating one during negotiations for patriation, resulting in the [Victoria Charter](#) in 1971, which was never implemented. Trudeau continued his efforts, however, promising constitutional change during the [1980 Quebec referendum](#). He succeeded in 1982 with the passage of the [Canada Act 1982](#) in the British Parliament, which enacted the *Constitution Act, 1982* as part of the Constitution of Canada.

The inclusion of a charter of rights in the *Constitution Act* was a much-debated issue. Trudeau spoke on television in October 1980,<sup>[12]</sup> where he announced his intention to constitutionalize a bill of rights that would include: fundamental freedoms, such as the freedom of movement; democratic guarantees; legal rights; language rights; and [equality rights](#).<sup>[13]:269</sup> However, Trudeau did not want a notwithstanding clause.<sup>[discuss]</sup> While his proposal gained popular support,<sup>[13]:270</sup> provincial leaders opposed the potential limits on their powers. The federal [Progressive Conservative opposition](#) feared liberal bias among judges, should courts be called upon to enforce rights.<sup>[13]:271</sup> Additionally, the British Parliament cited their right to uphold Canada's old form of government.<sup>[13]:272</sup> At a suggestion of the Conservatives, Trudeau's government thus agreed to a committee of [senators](#) and [members of Parliament](#) (MPs) to further examine the bill as well as the patriation plan. During this time, 90 hours were spent on the bill of rights alone, all filmed for television, while civil rights experts and [advocacy groups](#) put forward their perceptions on the *Charter's* flaws and omissions and how to remedy them.<sup>[13]:270</sup> As Canada had a parliamentary system of government, and as judges were perceived not to have enforced rights well in the past, it was questioned whether the courts should be named as the enforcers of the *Charter*, as Trudeau wanted. Conservatives argued that elected politicians should be trusted instead. It was eventually decided that the responsibility should go to the courts. At the urging of [civil libertarians](#), judges could now exclude evidence in trials if acquired in breach of *Charter* rights in certain circumstances, something the *Charter* was not originally going to provide for.

As the process continued, more features were added to the *Charter*, including equality rights for people with disabilities, more sex equality guarantees, and recognition of Canada's [multiculturalism](#). The limitations clause was also reworded to focus less on the importance of parliamentary government and more on the justifiability of limits in free societies; the latter logic was more in line with rights developments around the world after World War II.<sup>[13]:271–2</sup>

In its decision in the [Patriation Reference](#) (1981), the [Supreme Court](#) had ruled there was a [constitutional convention](#) that some provincial approval should be sought for constitutional reform. As the provinces still had doubts about the *Charter's* merits, Trudeau was forced to accept the notwithstanding clause to allow governments to opt out of certain obligations. The notwithstanding

clause was accepted as part of a deal called the [Kitchen Accord](#), negotiated by the federal attorney general [Jean Chrétien](#), Ontario's justice minister [Roy McMurtry](#), and Saskatchewan's justice minister [Roy Romanow](#). Pressure from provincial governments (which in Canada have jurisdiction over property) and from the [New Democratic Party](#), also prevented Trudeau from including any rights protecting private property.<sup>[14]</sup>

## Quebec

Quebec did not support the *Charter* (or the *Canada Act 1982*), with "conflicting interpretations" as to why. The opposition could have owed to the [Parti Québécois](#) (PQ) leadership being allegedly uncooperative because it was more committed to gaining sovereignty for Quebec. This could have owed to the exclusion of Quebec leaders from the negotiation of the Kitchen Accord, which they saw as being too centralist. It could have also owed to objections by provincial leaders to the Accord's provisions relating to the process of future constitutional amendment.<sup>[15]</sup> The PQ leaders also opposed the inclusion of mobility rights and minority language education rights.<sup>[16]</sup> The *Charter* is still applicable in Quebec because all provinces are bound by the Constitution. However, Quebec's opposition to the 1982 patriation package led to two failed attempts to amend the Constitution (the [Meech Lake Accord](#) and [Charlottetown Accord](#)) which were designed primarily to obtain Quebec's political approval of the Canadian constitutional order.

## Following 1982

While the *Canadian Charter of Rights and Freedoms* was adopted in 1982, it was not until 1985 that the main provisions regarding equality rights (section 15) came into effect. The delay was meant to give the federal and provincial governments an opportunity to review pre-existing statutes and strike potentially unconstitutional inequalities.

## Amendments

The *Charter* has been amended since its enactment. Section 25 was amended in 1983 to explicitly recognize more rights regarding [Aboriginal land claims](#), while [section 16.1](#) was added in 1993. There have also been a number of [unsuccessful attempts to amend the Charter](#), including the failed Charlottetown Accord of 1992. The Charlottetown Accord would have specifically required the *Charter* to be interpreted in a manner respectful of Quebec's [distinct society](#), and would have added further statements to the [Constitution Act, 1867](#) regarding racial and sexual equality and collective rights, and about [minority language](#) communities. Though the Accord was negotiated among many interest groups, the resulting provisions were so vague that Trudeau, then out of office, feared they would actually conflict with and undermine the *Charter's* individual rights. He felt judicial review of the rights might be undermined if courts had to favour the policies of provincial governments, as governments would be given responsibility over linguistic minorities. Trudeau thus played a prominent role in leading the popular opposition to the Accord.<sup>[17]</sup>

## Interpretation and enforcement

The task of interpreting and enforcing the *Charter* falls to the courts, with the Supreme Court of Canada (SCC) being the ultimate authority on the matter.

With the *Charter's* supremacy confirmed by section 52 of the *Constitution Act, 1982*, the courts continued their practice of striking down unconstitutional statutes or parts of statutes as they had with earlier case law regarding federalism. However, under section 24 of the *Charter*, courts also gained new

powers to enforce creative remedies and exclude more evidence in trials. Courts have since made many important decisions, including [R v Morgentaler](#) (1988), which struck down [Canada's abortion law](#), and [Vriend v Alberta](#) (1998), in which the Supreme Court found the province's exclusion of [sexual orientation](#) as a prohibited grounds of discrimination violated the equality rights under section 15. In the latter case, the Court then read the protection into the law.

Courts may receive *Charter* questions in a number of ways. Rights claimants could be prosecuted under a [criminal law](#) that they argue is unconstitutional. Others may feel government services and policies are not being dispensed in accordance with the *Charter*, and apply to lower-level courts for injunctions against the government.<sup>[c]</sup> A government may also raise questions of rights by submitting [reference questions](#) to higher-level courts; for example, Prime Minister [Paul Martin](#)'s government approached the Supreme Court with *Charter* questions as well as federalism concerns in the case [Re Same-Sex Marriage](#) (2004). Provinces may also do this with their superior courts. The government of [Prince Edward Island](#) initiated the [Provincial Judges Reference](#) by asking its [provincial Supreme Court](#) a question on [judicial independence](#) under section 11.

In several important cases, judges developed various tests and precedents for interpreting specific provisions of the *Charter*, including the [Oakes test](#) (section 1), set out in the case [R v Oakes](#) (1986); and the [Law test](#) (section 15), developed in [Law v Canada](#) (1999) which has since become defunct.<sup>[18]</sup> Since [Reference Re BC Motor Vehicle Act](#) (1985), various approaches to defining and expanding the scope of [fundamental justice](#) (i.e., [natural justice](#) or [due process](#)) under section 7 have been adopted.<sup>[d]</sup>

## Purposive and generous interpretation

In general, courts have embraced a [purposive interpretation](#) of *Charter* rights. This means that since early cases, such as [Hunter v Southam](#) (1984) and [R v Big M Drug Mart](#) (1985), they have concentrated less on the traditional, limited understanding of what each right meant when the *Charter* was adopted in 1982. Rather, focus has been given towards changing the scope of rights as appropriate to fit their broader purpose.<sup>[1]: 722, 724–25</sup> This is tied to the *generous interpretation* of rights, as the purpose of the *Charter* provisions is assumed to be to increase rights and freedoms of people in a variety of circumstances, at the expense of the government powers.

Constitutional scholar [Peter Hogg](#) (2003) has approved of the generous approach in some cases, although for others he argues the purpose of the provisions was not to achieve a set of rights as broad as courts have imagined.<sup>[1]: 722, 724–25</sup> The approach has not been without its critics. Alberta politician [Ted Morton](#) and political scientist [Rainer Knopff](#) have been very critical of this phenomenon. Although they believe in the validity of the [living tree doctrine](#), which is the basis for the approach (and the tradition term for generous interpretations of the Canadian Constitution), they argue *Charter* case law has been more radical. When the living tree doctrine is applied correctly, Morton and Knopff (2000) claim, "the elm remained an elm; it grew new branches but did not transform itself into an oak or a willow." The doctrine can be used, for example, so a right is upheld even when a government threatens to violate it with new technology, as long as the essential right remains the same, but the authors claim that the courts have used the doctrine to "create new rights". As an example, the authors note that the *Charter* right against [self-incrimination](#) has been extended to cover scenarios in the justice system that had previously been unregulated by self-incrimination rights in other Canadian laws.<sup>[19]: 46–47</sup>

## Other interpretations

Another general approach to interpreting *Charter* rights is to consider international legal precedents



with countries that have specific rights protections, such as the [\*U.S. Bill of Rights\*](#) (which had influenced aspects of the *Charter*) and the [\*Constitution of South Africa\*](#). However, international precedent is only of guiding value and is not binding. For example, the SCC has referred to the *Charter* and the *U.S. Bill of Rights* as being "born to different countries in different ages and in different circumstances".[\[e\]\[1\]](#):232

Advocacy groups frequently [intervene](#) in cases to make arguments on how to interpret the *Charter*. Some examples are the [British Columbia Civil Liberties Association](#), [Canadian Civil Liberties Association](#), [Canadian Mental Health Association](#), [Canadian Labour Congress](#), the [Women's Legal Education and Action Fund](#) (LEAF), and [REAL Women of Canada](#). The purpose of such interventions is to assist the court and to attempt to influence the court to render a decision favourable to the legal interests of the group.

A further approach to the *Charter*, taken by the courts, is the [dialogue principle](#), which involves greater participation by elected governments. This approach involves governments drafting legislation in response to court rulings and courts acknowledging the effort if the new legislation is challenged.

## Comparisons with other human rights documents

Some Canadian [members of Parliament](#) saw the movement to entrench a charter as contrary to the British model of [Parliamentary supremacy](#). Hogg (2003) has speculated that the reason for the British adoption of the [Human Rights Act 1998](#), which allows the [European Convention on Human Rights](#) to be enforced directly in domestic courts, is partly because they were inspired by the similar *Canadian Charter*.[\[20\]](#)

The *Canadian Charter* bears a number of similarities to the European Convention, specifically in relation to the limitations clauses contained in the European document.[\[21\]](#) Because of this similarity with European human rights law, the SCC turns not only to the [United States Constitution](#) case law in interpreting the *Charter*, but also to [European Court of Human Rights](#) cases.

### *Canadian Charter vs. U.S. Bill of Rights*

The core distinction between the *U.S. Bill of Rights* and the *Canadian Charter* is the existence of the limitations and notwithstanding clauses. Canadian courts have consequently interpreted each right more expansively. However, due to the limitations clause, where a violation of a right exists, the law will not necessarily grant protection of that right.[\[1\]](#):232–3 In contrast, rights under the *U.S. Bill* are absolute, thus a violation will not be found until there has been sufficient encroachment on those rights. The sum effect is that both constitutions provide comparable protection of many rights.[\[1\]](#):232–3 Canada's "fundamental justice" (section 7) is therefore interpreted to include more legal protections than [due process](#), which is the U.S. equivalent.

Freedom of expression (section 2) also has a wider-ranging scope than the freedom of speech guaranteed under the U.S. [First Amendment](#) (1A).[\[1\]](#):232–3 For instance, a form of [picketing](#), though involving speech that might have otherwise been protected, was deemed as disruptive conduct and not protected by the U.S. 1A, but was considered by the SCC in [RWDSU v. Dolphin Delivery Ltd.](#) (1986). The SCC would rule the picketing, including the disruptive conduct, as fully protected under section 2 of the *Charter*, after which section 1 would be used to argue the injunction against the picketing as just.[\[22\]](#)

The limitations clause has also allowed governments to enact laws that would be considered unconstitutional in the U.S. For example, the SCC has upheld some of Quebec's limits on the use of



[English](#) on signs and has upheld [publication bans](#) that prohibit media from mentioning the names of juvenile criminals.

The un-ratified [Equal Rights Amendment](#) in the U.S., which garnered many critics when proposed, performs a similar function to that of the *Charter* section 28, which received no comparable opposition. [23] Still, Canadian feminists had to stage large protests to demonstrate support for the inclusion of section 28, which had not been part of the original draft of the *Charter*. [24][25]

## Comparisons to other documents

The [International Covenant on Civil and Political Rights](#) has several parallels with the Canadian *Charter*, but in some cases the Covenant goes further with regard to rights in its text. For example, a right to [legal aid](#) has been read into section 10 of the *Charter* (right to counsel), but the Covenant explicitly guarantees the accused need not pay "if he does not have sufficient means". [1]:233–4

Canada's *Charter* has little to say, explicitly at least, about economic and social rights. On this point, it stands in marked contrast with the [Quebec Charter of Human Rights and Freedoms](#) and with the [International Covenant on Economic, Social and Cultural Rights](#). There are some who feel economic rights ought to be read into the rights to [security of the person](#) (section 7) and equality rights (section 15) to make the *Charter* similar to the Covenant. [24] The rationale is that economic rights can relate to a decent [standard of living](#) and can help the civil rights flourish in a livable environment. [24] Canadian courts, however, have been hesitant in this area, stating that economic rights are [political questions](#) and adding that as [positive rights](#), economic rights are of questionable legitimacy. [24]

The *Charter* itself influenced the [Bill of Rights](#) in the Constitution of South Africa. [24] The limitations clause under section 36 of the South African law has been compared to section 1 of the *Charter*. [21] Likewise, [Jamaica's](#) Charter of Fundamental Rights and Freedoms was also influenced, in part, by Canada's *Charter*. [26][27]

## The *Charter* and national values

The *Charter* was intended to be a source of [Canadian values](#) and national unity. As Professor [Alan Cairns](#) noted, "the initial federal government premise was on developing a pan-Canadian identity". [20] Pierre Trudeau (1993) himself later wrote in his *Memoirs* that "Canada itself" could now be defined as a "society where all people are equal and where they share some fundamental values based upon freedom", and that all Canadians could identify with the values of liberty and equality. [28]

The *Charter's* unifying purpose was particularly important to the mobility and language rights. According to author [Rand Dyck](#) (2000), some scholars believe section 23, with its minority language education rights, "was the only part of the *Charter* with which Pierre Trudeau was truly concerned". [29]:442 Through the mobility and language rights, [French Canadians](#), who have been at the centre of unity debates, are able to travel throughout all Canada and receive government and educational services in their own language. Hence, they are not confined to Quebec (the only province where they form the majority and where most of their population is based), which would polarize the country along regional lines. The *Charter* was also supposed to standardize previously diverse laws throughout the country and gear them towards a single principle of liberty. [1]:704–5

Former [premier of Ontario](#) [Bob Rae](#) has stated that the *Charter* "functions as a symbol for all Canadians" in practice because it represents the core value of freedom. [20] Academic [Peter Russell](#) has been more skeptical of the *Charter's* value in this field. Cairns, who feels the *Charter* is the most important constitutional document to many Canadians, and that the *Charter* was meant to shape the

Canadian identity, has also expressed concern that groups within society see certain provisions as belonging to them alone rather than to all Canadians.[20] It has also been noted that issues like [abortion](#) and [pornography](#), raised by the *Charter*, tend to be controversial.[1]: 704–5 Still, [opinion polls](#) in 2002 showed Canadians felt the *Charter* significantly represented Canada, although many were unaware of the document's actual contents.[30]

The only values mentioned by the *Charter's* [preamble](#) are [recognition of the supremacy of God](#) and the [rule of law](#), but these have been controversial and of minor legal consequence. In 1999, MP [Svend Robinson](#) brought forward a failed proposal before the [House of Commons of Canada](#) that would have amended the *Charter* by removing the mention of God, as he felt it did not reflect Canada's diversity.

Section 27 also recognizes a value of multiculturalism. In 2002, polls found 86% of Canadians approved of this section.[31]

## Criticism

While the *Charter* has enjoyed a great deal of popularity, with 82 percent of Canadians describing it as a good thing in opinion polls in 1987 and 1999,[20] the document has also been subject to published criticisms from both sides of the political spectrum. One left-wing critic is professor [Michael Mandel](#) (1989),[f] who wrote that in comparison to politicians, judges do not have to be as sensitive to the will of the electorate, nor do they have to make sure their decisions are easily understandable to the average Canadian citizen. This, in Mandel's view, limits democracy.[29]: 446 Mandel has also asserted that the *Charter* makes Canada more like the United States, especially by serving corporate rights and [individual rights](#) rather than group rights and social rights.[29]: 446 He has argued that there are several things that should be included in the *Charter*, such as a [right to health care](#) and a basic right to free education. Hence, the perceived [Americanization](#) of Canadian politics is seen as coming at the expense of values more important for Canadians.[29]: 446 The labour movement has been disappointed in the reluctance of the courts to use the *Charter* to support various forms of union activity, such as the "right to strike".[needs update]

Conservative critics [Morton](#) and [Knopff](#) (2000) have raised several concerns about the *Charter*, notably by alleging that the federal government has used it to limit provincial powers by allying with various rights claimants and interest groups. In their book *The Charter Revolution & the Court Party* (2000), Morton and Knopff express their suspicions of this alliance in detail, accusing the Pierre Trudeau and Chrétien governments of funding litigious groups. For example, these governments used the [Court Challenges Program](#) to support minority language educational rights claims. Morton and Knopff also assert that [crown counsel](#) has intentionally lost cases in which the government was taken to court for allegedly violating rights,[g] particularly [gay rights](#) and [women's rights](#). [19]: 95

Political scientist [Rand Dyck](#) (2000), in observing these criticisms, notes that while judges have had their scope of review widened, they have still upheld most laws challenged on *Charter* grounds. With regard to litigious interest groups, Dyck points out that "the record is not as clear as Morton and Knopff imply. All such groups have experienced wins and losses." [29]: 448

Political philosopher [Charles Blattberg](#) (2003) has criticized the *Charter* for contributing to the fragmentation of the country, at both the individual and group levels. In encouraging discourse based upon rights, Blattberg claims the *Charter* injects an adversarial spirit into Canadian politics, making it difficult to realize the common good. Blattberg also claims that the *Charter* undercuts the Canadian political community since it is ultimately a cosmopolitan document. Finally, he argues that people would be more motivated to uphold individual liberties if they were expressed with terms that are much "thicker" (less abstract) than rights.[32]

